IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0431

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JERRY PAUL GONZALES,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Gregory R. Todd, Presiding

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STATEMENT OF THE CASE AND FACTS

On December 7, 2007, the State charged the Appellant Jerry Gonzales (Gonzales) with Attempted Deliberate Homicide, alleging that Gonzales attempted to kill his estranged wife, K.M., by pouring gasoline in the cab of a pickup truck, and holding K.M. in the truck after he ignited the gasoline. (D.C. Docs. 1, 3.)

Gonzales hired attorney Jeffrey Michael (Michael) to represent him. At the time, Michael had been a licensed Montana attorney for 17 years. Michael's practice had been and continues to be exclusively criminal defense. In last nine years, Michael has handled approximately 2,500 cases dealing with just about every criminal offense, including homicides. (Motion to Withdraw Plea Hr'g Tr. [Tr.] at 144-45.)

Prior to representing Gonzales in this case, Michael had represented Gonzales on five or six misdemeanors, some of which were revocation proceedings. Michael had developed a rapport with Gonzales. (Tr. at 146-48.)

Michael agreed to represent Gonzales for a flat fee of $8,000. K.M. made an initial payment of $2,000 on January 7, 2008. K.M. was to pay the remaining $6,000 after she received her tax refund, which she did on February 11, 2008. (D.C. Doc. 54.) Despite the fact that K.M. was the victim here, she kept in contact with Gonzales throughout the criminal proceedings. K.M. dropped her divorce proceeding with Gonzales in December 2007. (Tr. at 79-81.)

Initially, Michael made some phone calls regarding the charge, he met with Gonzales and also talked to K.M. From Gonzales's initial incarceration on December 7, 2007, to the middle of February 2008, Michael had almost daily contact with Gonzales or someone from his family. Gonzales was free to call Michael's office collect from the jail. Michael had almost daily conversations with K.M. Michael discussed with Gonzales that the ultimate goal of the case would be to reduce the charge of Attempted Deliberate Homicide to some other felony. (Tr. at 148-51, 156-57.) Michael spoke to Gonzales and K.M. numerous times regarding the possibility of pleading guilty to felony Arson. Gonzales agreed that if he could get it he would plead guilty to felony Arson. (Tr. at 161-62.)

Gonzales has dyslexia and a learning disability as far as written language, spelling and reading. (Tr. at 19, 67, 90.) Psychologist Michael Bruner examined Gonzales and later testified as an expert for Gonzales. Dr. Bruner stated that for Gonzales to understand legal documents they would have to be read to Gonzales

and then Gonzales would have to be asked about his understanding of the documents. (Tr. at 25.)

Michael was well aware of Gonzales's learning disabilities. Michael spent more time with Gonzales explaining things to him than with his other clients because of the learning disabilities. Micheal explained to Gonzales any of the filed legal documents. Michael also spent time explaining things to K.M., so she too could explain things to Gonzales. Michael testified that Gonzales understood what he was telling him. (Tr. at 154-55, 182-83, 186.)

Michael discussed the discovery with Gonzales and reviewed Gonzales's confession with him, ultimately concluding that there were no grounds to suppress the confession. (Tr. at 187.) Michael also interviewed the victim, K.M. (Tr. at 208.)

As result of Michael's plea negotiations, the State agreed to file an Amended Information charging Gonzales with Arson and to recommend a 10-year Department of Corrections (DOC) sentence with 5 years suspended. Under the agreement, Michael would be free to argue for a lesser sentence. (Tr. at 164.) Michael told Gonzales that he would try to get him a suspended sentence, but that was not likely to happen. (Tr. at 165.) Michael never promised Gonzales that he would get into a prerelease or the intensive supervision program. (Tr. at 166-67.)

On February 4, 2008, Michael received a letter from Gonzales in which Gonzales stated he no longer required Michael's services and he had hired another

attorney. Gonzales also asked Michael to return the money he had paid him. (Def.'s Ex. G; Tr. at 195-97.) At the time, Gonzales had paid Michael only $2,000 of Michael's $8,000 fee. (D.C. Doc. 54 at 2-3.) Michael was too busy to immediately talk to Gonzales and since Michael's investigator, Tom Taggert, was already going to down to the jail to see Gonzales, Michael had Taggert talk to Gonzales. (Tr. at 173-74, 197-98.) In order to help Taggert explain Michael's response, Michael wrote down some notes on the bottom of the letter. The notes stated that there wouldn't be a refund, we already worked the case, we read discovery, and there's a partial plea agreement. Micheal also wrote: "If I back out, they'll go forward with an attempted, and they will–and they will win and [K.M.] can't help. She will hurt you again." (Tr. at 197-98.)

After talking to Gonzales, Taggert told Michael that Gonzales wanted to speak to him. Michael then went down to the jail to speak to Gonzales. Michael explained to Gonzales why he was not getting a refund, what had already been done on the case and the direction of the case. Michael testified that Gonzales seemed satisfied with what was going on. (Tr. at 173-74.)

On February 22, 2008, the State amended the Information, charging Gonzales with felony Arson, in violation of Mont. Code Ann. § 45-6-103(1)(a) (2007). (D.C. Doc. 29.) On February 25, 2008, the district court conducted a change of plea hearing and Gonzales filed an Acknowledgment of Waiver of

Rights by Plea of Guilty (Waiver) with the court. (D.C. Docs. 30, 32.) Gonzales signed the Waiver on the day of the change of plea hearing. The waiver contained the terms of the plea agreement. (D.C. Doc. 32.) Approximately a week and half before they appeared for the change of plea, Michael reviewed with Gonzales the rights set forth in the Waiver, the rights Gonzales was giving up by pleading guilty, and the possible penalties. (Tr. at 160-61, 211-12, 242-43.) Michael also clearly explained to Gonzales that the plea agreement was a "1c" nonbinding-type of agreement. (Tr. at 213.) Michael testified that when they discussed the rights Gonzales was giving up and his pleading guilty, Gonzales asked appropriate questions. (Tr. at 243.) Regarding Gonzales's understanding of his guilty plea, Michael testified:

> I mean, he understood the sentence, and he understood what pleading guilty was. I mean, Mr. Gonzales has been in court before. I mean, this isn't the first go-around.

(Tr. at 243.)

At the change of plea hearing, Gonzales acknowledged signing the Waiver. (State's Ex. A (2/25/08 Tr.) at 2-3.) When the district court asked Gonzales about whether he reads and his understanding of English, the court, Gonzales and Michael engaged in the following discussion:

> THE COURT: And do you read and understand the English language?
>
> MR. GONZALES: Not very well, sir.

MR. MICHAEL: Judge, I will tell you he does have some dyslexia problems, so I have taken special efforts to go over this. I saw him at the jail, he knows what the agreement was, and the form and everything he's waiving.

So you understand all that. We have gone over this?

MR. GONZALES: Yes, sir.

MR. MICHAEL: Okay.

THE COURT: So are you satisfied that Mr. Michael has explained matters on what's going on here today to your satisfaction then?

MR. GONZALES: Yes, sir.

THE COURT: Okay. And even though you may have trouble reading, did you have trouble understanding what Mr. Michael was telling you?

MR. GONZALES: A little bit, but I can go.

THE COURT: Well, you be sure and stop me if you don't understand or if there's something different that is being stated here than what may have been stated before; okay?

MR. GONZALES: (Nods head.)

Id. at 3-4.

The district court explained the potential maximum penalty for Arson, that if he went to trial he could be found guilty, not guilty, or guilty of Negligent Arson, a misdemeanor. Gonzales understood those options. Gonzales also acknowledged that Michael had explained the Amended Information, and the charge of Negligent Arson. Id. at 4. The district court asked Gonzales if he understood that he was giving up a wide variety of constitutional rights by pleading guilty, and Gonzales

responded affirmatively. The court explained those rights to Gonzales, and Gonzales stated he was willing to give them up. Gonzales stated that Michael discussed the rights with him, and he had enough opportunity to ask him questions regarding those rights. Id. at 5-6.

Gonzales understood that the plea agreement was not binding on the sentencing judge, the sentencing judge could sentence him to more than what is set forth in the plea agreement, and he could not withdraw his plea if the judge did so. Gonzales said he was not under the influence of drugs or alcohol. Id. at 6-7. The district court and Gonzales engaged in the following discussion regarding his understanding of the change of plea proceeding in light of his dyslexia and Michael's representation:

> THE COURT: Are you suffering from any disability that affects you, your understanding of this agreement? Now, you've talked about your dyslexia or other limits on your reading. Have you understood what we've said here today?
>
> MR. GONZALES: Yes, I do, sir.
>
> THE COURT: And does it coincide with what Mr. Michael has told you?
>
> MR. GONZALES: Yes. Yes, sir.
>
> THE COURT: Do you have any questions that you wish to ask now either to Mr. Michael or to me about this process?
>
> MR. GONZALES: No.
>
> THE COURT: Okay. Do you understand that in just a minute or two I'll ask you if you officially and formally change your plea. And if

you do that, then this may be a done deal as far as your guilty plea is concerned. You may not be able to withdraw that even if you get cold feet or say that you didn't understand it later.

MR. GONZALES: Yes, I do understand that.

THE COURT: Knowing all of that, are you still willing to go ahead and plead guilty here?

MR. GONZALES: Yes, I do.

THE COURT: Are you satisfied with the services of Mr. Michael?

MR. GONZALES: I am.

THE COURT: Have you had enough time to think about this so that you want to plead guilty today to this arson charge?

MR. GONZALES: Yes, I do.

Id. at 7-8.

With the assistance of Michael, Gonzales provided the following factual basis for his guilty plea:

MR. MICHAEL: Jerry, on December 2nd, 2008, you started a fire purposely or knowingly--or did you start a fire in your truck or your wife's truck? You were married, so it's in dispute whose truck it was, but a truck that--your wife was in the truck; is that correct?

MR. GONZALES: Whatever it says there.

MR. MICHAEL: Okay. I started a fire in my truck, and my wife was in the truck; is that correct?

MR. GONZALES: Yes.

MR. MICHAEL: And you knew that this was against the law?

MR. GONZALES: Yes.

MR. MICHAEL: And that happened in Yellowstone County, Montana?

MR. GONZALES: Yes.

MR. MICHAEL: Judge, the statute does just say that it does cause--that there is a risk of bodily injury or death, and that would even include firefighters. So the fact that the wife was in the vehicle, he did put her in that risk. And it does talk about a vehicle, I guess maybe the truck--The value of the truck exceeded a thousand dollars as well; is that correct?

MR. GONZALES: (Nods head.) Yes.

MR. MICHEAL: Yes.

THE COURT: As far as I think the date here that you wrote on this--

MR. MICHAEL: I'm sorry, 2007. I'm sorry, Judge.

THE COURT: Yes. So this occurred just about three months ago; is that correct--

MR. GONZALES: Yes.

Id. at 9-10. Gonzales pled guilty and the district court accepted his plea. Id. at 10.

Gonzales's expert, Dr. Butz, reviewed the change of plea and sentencing transcripts. Dr. Butz testified that the district court judge did not speak or question Gonzales at a level that Gonzales could not understand. He also stated that the judge "was very fair-minded and did a thorough job." (Tr. at 44-45.)

Gonzales later claimed that Michael never prepared him for entering his guilty plea, and that he wanted to withdraw his plea before he actually entered it. (Tr. at

102.) He also stated that after he entered his plea he told Michael that he wanted to withdraw it. (Tr. at 198.) Michael testified that Gonzales did not tell him he wanted to withdraw his plea immediately after the plea hearing. (Tr. at 214.) Gonzales first started talking about wanting to withdraw his plea after he was denied admission into prerelease. Michael stated that Gonzales's denial into prerelease was not the reason Gonzales wanted to withdraw his plea. Rather, Gonzales wanted to withdraw his plea because he wanted a misdemeanor. (Tr. at 236-37.)

Michael met with Gonzales at the jail on more than one occasion to discuss the withdrawing of his plea prior to sentencing. (Tr. at 170, 234, 236-37, 238-39.) Michael told Gonzales that he was not going to get a misdemeanor. Michael told Gonzales that if he wanted to withdraw the guilty plea he would file the appropriate motion with the court, but Michael explained to him why he should refrain from doing so. (Tr. at 170-71.) Michael testified that Gonzales opted for him not to file the withdrawal motion. (Tr. at 234-35.)

By the time of sentencing, Gonzales again expressed an interest in withdrawing his plea. In light of their disagreements, Michael thought it was best to inform the district court of the situation at sentencing. (Tr. at 171.) At the May 19, 2008 sentencing, Michael told the district court the following:

> Judge, there's a couple things I better put on the record here this morning. Mr. Gonzales did come in and plead to an arson. We did an Acknowledgment of Waiver of Rights by Plea of Guilty, which is before the Court. Since that time, we've had some heated discussions

> over the last several months about my client's wanting to withdraw his plea. I have filed a motion--not filed, but I have a motion ready to go to withdraw his plea. I've tried to explain probably no less than five or six times, my investigator's tried to explain that if his plea was withdrawn at this time, that the charge would go back to an attempted deliberate homicide.
>
> I don't know that he understands that, or if he does, he's not liking the idea of the whole thing. I think the point of the victim testifying up here is the fact that the reason that this was dropped to an arson is because she went and told several different stories to the county attorney's office. We sat down in plea negotiations, and this is the agreement we came up with. I have to tell the court, at this point I'm not entirely sure what my client is going to do here this morning, if he wants to go forward with sentencing or if he wants me to file a motion to withdraw the plea.
>
> I think it's important that he understands, though, that we would be back to an attempted deliberate homicide. He doesn't like the arson charge. He thinks it should be a negligent arson. I tried to explain to him that's kind of not his position. He has a certain sentence that he would like to receive. I told him that that's not his position or his right to do that, that the Court is going to decide what the sentence is. There is a plea agreement, . . . but I also explained that the reason it's not binding is I'm free to argue for less, which obviously he wants.
>
> So the point is, I guess, I need to ask my client on the record here today what he wants to do.

(State's Ex. 2 (5/19/08 Tr.) at 4-5.) The district court asked Michael if he wanted to talk to Gonzales off the record, and Michael responded he did not. Id. at 5. Michael explained that he told the district court he did not want to talk to Gonzales because they already had numerous conversations regarding the issue, and they both knew each others' positions. (Tr. at 172.)

The district court, Gonzales, and Michael then engaged in the following colloquy concerning whether Gonzales wanted to withdraw his plea or proceed with sentencing:

> THE COURT: Well, Mr. Gonzales, do you understand what Mr. Michael has just said?
>
> MR. GONZALES: Yes, I do.
>
> THE COURT: Well, what is it that you want to do today?
>
> MR. GONZALES: I'd rather just go on with the sentencing.
>
> MR. MICHAEL: You understand that I've written a motion, I haven't filed it until we--
>
> MR. GONZALES: Mm-hmm.
>
> MR. MICHAEL: And you understand I'm not going to file it?
>
> MR. GONZALES: Yes.
>
> MR. MICHAEL: You're not going to be allowed to withdraw your plea?
>
> MR. GONZALES: (Nods head.)
>
> MR. MICHAEL: And the sentence you receive here today is the sentence you're going to get.
>
> MR. GONZALES: Mm-hmm.
>
> MR. MICHAEL: And you want to go forward with this?
>
> MR. GONZALES: You're my lawyer.
>
> MR. MICHAEL: Well, no, that's not the question I want to hear.

MR. GONZALES: Yes, I do.

THE COURT: Okay. Well, you understand that, according to Mr. Michael then, there has been discussions between the two of you about you possibly withdrawing your plea; is that correct? Don't tell me about what you talked about, but is it correct there has been discussions about withdrawing your plea?

MR. GONZALES: Yes, there has.

THE COURT: And Mr. Michael has in fact drafted some paperwork, has a motion, if it's not ready, it's at least in progress that could be filed; is that true?

MR. GONZALES: Yes, yes.

MR. MICHAEL: Judge, I would also like to put on the record, I also know that you've contacted several other attorneys with regard to this, and I don't know if they've given you advice or not given you advice, and that's not the point.

MR. GONZALES: No.

MR. MICHAEL: The point is, if we go forward here today, I don't want to hear any more of that.

MR. GONZALES: Yeah, I hear you. I'd rather just gone [sic] on with it.

MR. MICHAEL: You give up a right to an appeal here.

MR. GONZALES: Mm-hmm.

MR. MICHAEL: You understand that?

MR. GONZALES: Mm-hmm.

MR. MICHAEL: Judge, I guess based upon that we're prepared to go forward.

THE COURT: All right. Anything--

(State's Ex. 2 at 5-7.)

Michael recommended a five-year sentence with all but eight months suspended. Id. at 8-11. The district court then gave Gonzales the opportunity to speak, and he did so. Id. at 11-12. The court sentenced Gonzales to the DOC for ten years, with five years suspended. (D.C. Doc. 40.)

After sentencing, in August 2008, Gonzales left a phone message for Michael, in which Gonzales apologized for his earlier behavior and told Michael that he did not want to withdraw his plea. (State's Ex. 5.) Gonzales later changed his mind. On February 26, 2009, Gonzales filed a motion to withdraw his guilty plea and supporting affidavit. (D.C. Docs. 45, 46.) Gonzales argued that his plea was improperly induced by Michael's promise that he would receive a sentence that would allow him to enter into a prerelease center. Gonzales also argued that he was pressured into entering his plea because Michael did not review the written plea agreement until the day he entered his plea. He claimed that he had no opportunity for a "confidential consultation" with Michael because he signed the plea in open court. Gonzales argued that his plea was not intelligently entered because of his learning disability, and Michael did not allow sufficient time for him to review the written plea document. (D.C. Doc. 46 at 2.)

Gonzales claimed that Michael provided ineffective assistance of counsel because he failed to advise him of the "necessary lesser included offenses." Gonzales also argued that he had asked Michael to withdraw his plea, but Michael dissuaded him from doing so and violated his right to a confidential consultation by discussing the withdrawing of the plea in open court. Id. at 2.

On March 31, 2009, the State filed its response. (D.C. Doc. 52.) On April 24, 2009, Gonzales filed a motion to reserve filing his reply brief until after the district court held an evidentiary hearing. The State did not object. (D.C. Doc. 60.) The district court never issued an order regarding Gonzales's motion to reserve the filing of his reply brief.

On May 20, 2009, the district court conducted an evidentiary hearing. On May 27, 2009, the district court issued a written order denying Gonzales's motion to withdraw his plea. (D.C. Doc. 78, attached as App. A.) The district court rejected Gonzales's claim that Michael induced him to plead guilty on the promise that he would be placed in the Billings prerelease. (App. A. at 5- 7.) The district court noted that it had informed Gonzales that it would impose his sentence and it did not have to follow the plea agreement. The district court stated Michael had testified that he had never promised Gonzales placement at prerelease, and instead, told Gonzales that he would argue for a lesser sentence and have him screened for prerelease. Id. at 6. The district court observed that Gonzales was aware he was

denied placement in prerelease prior to telling the court he wished to proceed with sentencing and he did not want a motion to withdraw the plea filed on his behalf. Id. The court specifically found:

> The Defendant was fully informed of the consequences of pleading guilty and did not prove that he was induced to change his plea by threats or promises. The Defendant's plea of guilty was entered voluntarily. He knew what he could get and why. While the Defendant may not like the sentence he received, his discomfort does not show good cause.

Id. at 7.

Regarding Gonzales's learning disability, the district court stated that Michael knew about it and Michael also made the court aware of it at the change of plea hearing and sentencing. Id. at 4. The district court explained that because of Gonzales's learning disability, it questioned Gonzales on his understanding of his rights and asked Gonzales if he had any questions for the court or Michael prior to entering his guilty plea. The court noted that Gonzales responded "no" and that he was ready to change his plea. Id. at 4-5. The district court rejected Gonzales's suggestion that his learning disability rendered his plea involuntary or provided good cause for the withdrawal of his plea. Id. at 7-8.

Recognizing that the maximum penalty for the original charge of Attempted Deliberate Homicide was 100 years, the district court found that Gonzales received a substantial benefit under the plea agreement when the charge was amended to

Arson and the State agreed to recommend a sentence of 10 years with 5 years suspended. Id. at 6-7.

Regarding Gonzales's ineffective assistance claim, the district court found that Gonzales failed to argue the "two-prong test from *Strickland*, let alone provide evidence to support a finding that he was prejudice by his counsel's performance." The court emphasized Gonzales never stated that but for his counsel's deficient performance, he would not have pled guilty and insisted on going to trial for Attempted Deliberate Homicide. Id. at 5.

SUMMARY OF THE ARGUMENT

Gonzales's learning disabilities did not render his plea involuntary. At the change of plea hearing, Michael told the district court about Gonzales's learning disabilities and, as a result, the court carefully explained the various rights to Gonzales, and made sure he understood he was waiving those rights by pleading guilty. In addition, prior to the hearing, Michael carefully reviewed with Gonzales the rights he would be waiving by pleading guilty, the possible penalties and the binding nature of the plea agreement.

Gonzales has waived appellate review of his claim that his alleged unethical fee arrangement with Michael coerced him into pleading guilty by not raising that claim in the district court. Gonzales also waived appellate review of his claims

concerning factual the basis for his guilty plea by not raising them in the district court.

Gonzales has failed to demonstrate that Michael provided ineffective assistance under the Strickland test. Gonzales has not demonstrated that Michael's performance was unreasonable. Additionally, Gonzales merely alleges prejudice. Gonzales's conclusory allegation of prejudice is insufficient under Strickland.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING GONZALES'S MOTION TO WITHDRAW HIS GUILTY PLEA.

A. Applicable Law and Standard of Review

Montana Code Annotated § 46-16-105(2) "allows a court to withdraw a guilty plea and substitute a not guilty plea where good cause is shown." State v. McFarlane, 2008 MT 18, ¶ 11, 341 Mont. 166, 176 P.3d 1057. Involuntariness of a defendant's plea constitutes good cause for the withdrawal of plea under Mont. Code Ann. § 46-16-105(2). State v. Warclub, 2005 MT 149, ¶ 16, 327 Mont. 352, 114 P.3d 254. However, reasons other than involuntariness of the plea may constitute good cause for the withdrawal of a plea. Warclub, ¶ 16.

This Court has adopted the standard set forth in Brady v. United States, 397 U.S. 742 (1970), to determine the voluntariness of guilty pleas. Warclub, ¶ 18. This Court "will not overturn a district court's denial of a motion to withdraw a

guilty plea if the defendant was aware of the direct consequences of such a plea, and if his plea was not induced by threats, misrepresentation, or an improper promise such as a bribe." Warclub, ¶ 32, citing Brady, 397 U.S. at 755. When determining if a defendant voluntarily entered a guilty plea and whether the district court erred in denying a motion to withdraw the plea, this Court examines "case-specific considerations." McFarlane, ¶ 17. As this Court stated, "[t]hese considerations include the adequacy of the district court's interrogation, the benefits obtained from a plea bargain, the withdrawal's timeliness, and other considerations that may affect the credibility of the claims presented." Id.

This Court reviews a district court's denial of a defendant's motion to withdraw his guilty plea to determine whether its findings of fact are clearly erroneous. McFarlane, ¶ 8. This Court "will then review the ultimate, mixed question of voluntariness *de novo*, to determine if the district court's interpretation of the law--and application of the law to facts--is correct." Warclub, ¶ 23.

It is the role of the trier of fact to decide the credibility of the witnesses. State v. Santos, 273 Mont. 125, 131, 902 P.2d 510, 514 (1995); accord Hendricks v. State, 2006 MT 22, ¶ 16, 331 Mont. 47, 128 P.3d 1017. "In the event of conflicting evidence, it is within the province of the trier of fact to determine which will prevail." Santos, 273 Mont. at 131, 902 P.2d at 514. On appeal, this Court does not disturb the trier of fact's determinations of witness credibility. Hendricks, ¶ 16.

B. The District Court Applied the Law Correctly and Its Findings of Fact Are Not Clearly Errenous.

In State v. Boucher, 2002 MT 114, ¶ 25, 309 Mont. 514, 48 P.3d 21, the Court stated that "[i]f there is any doubt that a plea was involuntary, the doubt should be resolved in favor of defendant." Gonzales argues that the district court failed to properly apply the principles in Boucher because it resolved all doubts in favor of the State. In support of his argument, Gonzales notes that the district court found that Michael had daily contact with Gonzales and his family for two months leading up the change of plea even though he and K.M. testified otherwise. Gonzales's argument is unpersuasive on a number of fronts.

First, the principle of resolving doubt in favor of the defendant, only applies if there is "any doubt that a plea was involuntary." Boucher, ¶ 25. In Boucher, when the defendant entered his guilty plea, the justice court failed to question him regarding the constitutional rights he was waiving and whether he understood the waivers. Id., ¶¶ 26-28. The Court concluded the justice court's colloquy was inadequate and good cause existed for the defendant to withdraw his plea. Id., ¶ 28. The Court stated: "Since any doubt about whether a plea was voluntary should be resolved in favor of the defendant, we hold that the District Court, **under these facts**, erred by not allowing Boucher to withdraw his guilty plea." Id., ¶ 29 (emphasis added).

The facts in this case are distinguishable from those in Boucher. The change of plea transcript reveals that the district court clearly questioned Gonzales about the rights he was waiving and whether he understood the waiver. (State's Ex. A at 4-8.) The doubt about voluntariness that plagued the plea in Boucher is not present here, and therefore, the principle of resolving doubt in favor of the defendant is inapplicable here.

Moreover, the principle of resolving doubt concerning the voluntariness of a plea, did not require the district court simply blindly accept Gonzales's or K.M.'s testimony and reject the testimony of Michael regarding his contact and discussions with Gonzales. Michael testified that from December 7, 2007 to the middle of February 2008, he had almost daily contact with Gonzales or someone from his family. (Tr. at 148-51, 157.) Michael also testified he spoke to Gonzales and K.M. numerous times regarding the possibility of pleading guilty to felony Arson. (Tr. at 161-62.) Michael testified that approximately a week and a half prior to the change of plea hearing, he reviewed with Gonzales the rights he was waiving by pleading guilty, the possible penalty, and the binding nature of the plea agreement. (Tr. at 160-61, 211-12, 242-43.) Gonzales and K.M. disputed Michael's testimony. In resolving the conflicting testimony, it was the district court's role as trier of fact to decide who was more credible. Hendricks, ¶ 16; Santos, 273 Mont. at 131, 902 P.2d at 514. By stating in its order that Michael had

daily contact with Gonzales or a member of his family, the district court impliedly determined that Michael was more credible. This Court should refuse to disturb the district court's credibility determination on appeal. Hendricks, ¶ 16.

Gonzales also faults the district court's finding that he had an extensive criminal record. The district court's finding was not clearly erroneous. Gonzales's criminal record includes a felony burglary, 19 misdemeanors, 22 traffic offenses and a number of revocation proceedings. (PSI, D.C. Doc. 37 at 3-4; Tr. at 119-23.) Gonzales acknowledged participating in change of plea hearings in some of his city court traffic cases. (5/20/09 Tr. at 123-24.) Gonzales's extensive criminal history and experience with the criminal justice system indicates that he had an understanding of the change of plea proceeding and what he was doing and giving up when entering his guilty plea. The district court did not put undue emphasis on Gonzales's criminal history, but simply considered it as one of a number of factors in support of a conclusion that Gonzales voluntarily entered his plea. (App. A at 7-8.)

Finally, Gonzales's argument that the district court ignored Dr. Butz's testimony concerning his significant learning disability and the impact his learning disability had on his ability to understand the guilty plea proceeding is not compelling. The district court clearly recognized that Gonzales had a learning disability. The district court, however, correctly found that Gonzales's learning disability did not prevent him from knowingly and voluntarily entering his plea. In

its order, the district court stated that Gonzales called to Dr. Butz to testify about his learning disability and his reading level. The court also stated that "[i]t is undisputed that the Defendant has a learning disability, specifically dyslexia, and that the defendant has problems reading." (App. A at 4.) The district court observed:

> Mr. Michael knew of the Defendant's learning disability and also made the Court aware of those issues at both the change of plea and sentencing hearing. Based on that information, the Court, at the change of plea, questioned the Defendant on his understanding of his rights and asked the Defendant if he had any questions for the Court or Mr. Michael prior to entering his guilty plea. The Defendant said no and said he was ready to proceed with the change of plea.

(App. A at 4-5.) Later, the district court again acknowledged Gonzales's learning disability, but correctly found that it did not prevent Gonzales from understanding what he was doing and it did not show good cause to allow withdrawal of his plea. The court stated:

> Defendant's reading and learning disabilities are significant, but they are not dispositive of the issue. Mr. Michael's almost daily contact with the Defendant and his family for two months leading up to the change of plea, Mr. Michael's prior representation of the Defendant, the Defendant's substantial experience in the criminal justice system, Mr. Michael's availability for calls, the significant amount of time Mr. Michael spent with [K.M.], plus the in court colloquies tend to show the Defendant's plea was voluntary. All of these facts indicate that the Defendant was informed about the process and aware of the consequences of entering a plea of guilty. Defendant's learning disabilities do not show inability to understand verbal input or past experience. The Defendant has not demonstrated good cause to withdraw his plea.

(App. A at 7.)

Dr. Butz's testimony supports the district court's finding that Gonzales understood the change of plea proceeding. Dr. Butz reviewed the change of plea and sentencing hearing transcripts. Dr. Butz testified that the district court did not speak to or question Gonzales at a level that Gonzales could not understand. He also stated that the district court was very fair-minded and did a thorough job. (5/20/09 Tr. at 44-45.) Moreover, Gonzales's ability to understand and appropriately respond to his counsel's questioning at the hearing on his motion to withdraw his plea, calls into question his claim that he could not understand the district court's questioning at his earlier change of plea and sentencing hearings.

Finally, in assessing the voluntariness of Gonzales's plea, Gonzales's statements at the change of plea that he understood what was being said, the waiver of his rights, and that he had no questions for the district court or Michael should be given substantial weight by this Court in assessing the veracity of Gonzales's appellate claims. Chizen v. Hunter, 809 F.2d 560, 562 (9th Cir. 1986); see also United States v. Kaczynski, 239 F.3d 1108, 1114-15 (9th Cir. 2001) ("substantial weight" must be given to in-court statements).

C. Gonzales Has Waived Appellate Review of the Claim That His Fee Arrangement With Michael Coerced Him Into Pleading Guilty.

Prior to entering his guilty plea, Gonzales wrote Michael a letter dated January 31, 2008, stating that he no longer needed Michael's services and he had

hired another attorney. He asked Michael to return the money he had given to Michael. (Def.'s Ex. G.) Citing a State Bar Ethics Opinion, Gonzales believes that Michael's refusal to provide him with a refund was unethical, prevented him from hiring another attorney and forced him to continue on with Michael as his counsel. Although he does not specifically state so, Gonzales suggests that he would not have entered a guilty plea if he had different counsel. Gonzales claims the unethical fee arrangement amounted to financial coercion and provides good cause for the withdrawal of his plea. He faults the district court for glossing over his claim in its order.

This Court prohibits parties from raising new arguments or changing theories on appeal because it is fundamentally unfair to fault a district court for failing to rule on an issue it never had the opportunity to consider. McFarlane, ¶¶ 12, 15. In addition, raising a new issue on appeal is also unfair to the opposing party because the failure to raise the claim in the district court prevents the opposing party from introducing evidence and argument in the district court to rebut the claim. Moreover, when an issue is raised for the first time on appeal, this Court may have to decide an issue on an incomplete or undeveloped record.

In State v. Osterloth, 2000 MT 129, ¶ 20, 299 Mont. 517, 1 P.3d 946, the defendant attempted to raise an argument in support of the withdrawal of his plea that was not a basis in his motion to withdraw in the district court. This Court

stated that it does not address issues or theories raised for the first time on appeal and declined to address the defendant's argument. Id.

Here, the district court did not gloss over Gonzales's financial coercion claim. Gonzales never raised one in the district court. A review of Gonzales's motion to withdraw his plea and supporting affidavit reveals that Gonzales and his counsel never claimed that Gonzales was coerced into pleading guilty due to Michael's fee. (D.C. Docs. 45, 46.) At the change of plea hearing, Gonzales questioned Michael about his fee, but never informed the district court that he was attempting to show or contending that Gonzales was financially coerced into pleading guilty. (Tr. at 188-89.) When Gonzales's counsel questioned Michael on the amount of fee, the State understandably objected on relevancy grounds and the district court sustained the objection (5/20/09 Tr. at 188-90) because Gonzales never mentioned a financial coercion claim in his motion to withdraw his plea or supporting affidavit. Like the defendant in Osterloth, Gonzales is raising a claim for the first time on appeal. Since Gonzales is raising his claim that Michael's refusal to refund his fee amounted to financial coercion and good cause for withdrawal of his plea for the first time on appeal, this Court should refuse to consider it. McFarlane, ¶¶ 12, 15; Osterloth, ¶ 20.

Without specifically identifying which claims he is raising for the first time on appeal, Gonzales asks this Court to allow him "to advance arguments not earlier

made" because the district court wrongfully denied him the opportunity to do so after the evidentiary hearing. (Appellant's Br. at 17.) Gonzales suggests that he was unable to raise his arguments because that district court declined his request to submit findings of fact and conclusions of law. He also notes he had filed an unopposed motion to submit further briefing after the evidentiary hearing.

The district court did not prevent Gonzales from properly raising claims in the district court proceedings. The district court did not **decline** Gonzales's request to submit findings of fact and conclusions of law because Gonzales never made such a request. At the conclusion of the evidentiary hearing, Gonzales's counsel asked the district court if it was "requesting findings of fact and conclusions" and the court said "no." (Tr. at 252.) If Gonzales had wanted to submit findings of fact and conclusions of law as a means of raising a claim not previously stated in his motion to withdraw his plea, he should have asked the district court to do so.

Prior to the evidentiary hearing, Gonzales did file an unopposed motion to submit further briefing until after the evidentiary hearing. (D.C. Doc. 60.) The district court, however, never issued an order granting Gonzales's motion. During the evidentiary hearing, Gonzales never told the district court of his desire for further briefing. Gonzales only has himself to blame for his failure to properly first raise his claims in the district court proceedings. This Court should refuse to consider Gonzales's new claims for the first time on appeal. McFarlane, ¶¶ 12, 15.

Even if this Court were to address Gonzales's financial coercion claim, the limited appellate record shows that Michael's fee was not unethical and that Gonzales was not financially coerced into pleading guilty. The State Bar Ethics Opinion upon which Gonzales relies is understandably critical of nonrefundable fees because, as it explains, a client's right to discharge retained counsel would be thwarted because the client would risk paying for services not rendered and could be forced to continue with an attorney he or she no longer wants. The Opinion provides that if a client discharges a lawyer prior to a fee being earned, the lawyer's retention of nonrefundable fee would violate an attorney's professional responsibility to refund any advanced fee not earned under Mont. R. Prof'l Conduct 1.16(d). The Opinion further states an unearned fee is per se unreasonable and keeping that fee would be a violation of Mont. R. Prof'l Conduct 1.5(a).

Michael did not violate the rules of professional conduct. In his district court response to Gonzales's request for his file, Michael explained the fee arrangement. (D.C. Doc. 54.) Michael agreed to represent Gonzales for a flat fee of $8,000. On behalf of Gonzales, K.M. made an initial payment of $2,000 to Michael on January 7, 2008. K.M. was to pay the remaining $6,000 of Michael's fee after she received her tax refund. Id. at 1-2.

When Gonzales wrote Michael on January 31, 2008, telling him he had hired another attorney and wanted a refund of the money paid to Michael, K.M. had

paid Michael only $2,000 of his $8,000 fee. (D.C. Doc. 54 at 3.) Michael and Investigator Taggert both told Gonzales there would be no refund of the fee because of the work Michael had done on the case, which included the reading of the discovery and the negotiating of a partial plea agreement. (D.C. Doc. 54 at 3;Tr. at 173-74, 197-98.) Michael also informed Gonzales if he was no longer his counsel, the plea agreement with the State would no longer be valid and he would still be facing the Attempted Deliberate Homicide charge. (D.C. Doc. 54 at 3; Tr. at 197-98.) After explaining to Gonzales where the case was heading, Michael stated that Gonzales seemed satisfied and asked him to continue to work on the case. (D.C. Doc. 54 at 3-4; Tr. at 174.)

Michael's refusal to refund Gonzales the $2,000 did not violate the rules of professional conduct because he had earned the fee by reviewing discovery, negotiating a plea, as well as from his daily dialogue with Gonzales or members of his family. The fee was not unreasonable. Gonzales's reliance on the professional rules or the State Bar Ethics Opinion in an effort to show that he was financially coerced into pleading guilty is misplaced.

Finally, Gonzales's claim that he was financially coerced into retaining Michael as his counsel and forced to plead guilty is refuted by his statements at the change of plea hearing. Gonzales said he was satisfied with Michael's services. (App. A at 8.) He never told the district court he was unhappy with Michael's

representation or that he wanted new counsel. Gonzales's allegation of financial coercion does not provide good cause for the withdrawal of his guilty plea.

II. GONZALES FAILED TO DEMONSTRATE MICHAEL PROVIDED INEFFECTIVE ASSISTANCE.

In evaluating an ineffective assistance of counsel claim, this Court utilizes the two-part test in Strickland v. Washington, 466 U.S. 668 (1984). Whitlow v. State, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. Under the first part of the test, the defendant must show that counsel's performance was deficient. Strickland, 466 U.S. at 687; Whitlow, ¶ 10. Specifically, the "defendant must show that counsel's representation fell below an objective standard of reasonableness." Whitlow, ¶ 14, quoting Strickland, 466 U.S. at 688.

In order to eliminate the distorting effects of hindsight, judicial scrutiny of counsel performance must be highly deferential. Strickland, 466 U.S. at 689; Whitlow, ¶ 15. As this Court recognized, "'[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Whitlow, ¶ 32, citing Yarborough v. Gentry, 540 U.S. 1, 8 (2003). Courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; Whitlow, ¶ 15.

Under the second part of the Strickland test, the defendant must show that counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687;

Whitlow, ¶ 10. As in this case, when there is a guilty plea, the defendant must demonstrate prejudice by showing that a reasonable probability exists that, but for counsel's errors, the defendant would not have pled guilty and insisted on going to trial. State v. Turner, 2000 MT 270, ¶ 65, 302 Mont. 69, 12 P.3d 934, citing Hill v. Lockhart, 474 U.S. 52, 59 (1985). This Court does not need to evaluate counsel's alleged deficient performance under the first part of the Strickland test, if it determines that the defendant has suffered no prejudice from counsel's performance. State v. Hagen, 2002 MT 190, ¶ 19, 311 Mont. 117, 53 P.3d 885, citing Strickland, 466 U.S. at 697.

A. Michael's Alleged Failure to Regularly Communicate With Gonzales

Gonzales alleges Michael provided ineffective assistance because Michael failed to communicate regularly with him, explain his rights, review the discovery, and review Gonzales's taped confession. At the district court hearing, Michael disputed Gonzales's allegation. Michael testified that from Gonzales's initial incarceration on December 7, 2007, to the middle of February 2008, he had almost daily contact with Gonzales or someone from his family. (Tr. at 149.) Michael testified that he spent more time with Gonzales explaining things to him than with his other clients because of Gonzales's learning disabilities. (Tr. at 154-55.) Michael testified that he spoke to Gonzales and K.M. a number of times regarding the possibility of Gonzales pleading guilty to felony Arson, and Gonzales had

agreed that he would plead guilty to Arson. (Tr. at 161-62.) Michael further testified that he had discussed the discovery with Gonzales, and reviewed Gonzales's confession with him, ultimately concluding that there were no grounds to suppress it. (Tr. at 187.) Michael also testified that prior to the change of plea hearing he reviewed with Gonzales the rights he would be waiving by pleading guilty, the penalties, and the binding nature of the plea agreement. (Tr. at 160-61, 211-12, 242-43.)

Gonzales acknowledges that in resolving the conflicting testimony, the district court found Michael's testimony more credible, but claims the district court abused its discretion when it found Michael had regularly communicated with him and had properly advised him. Gonzales argues that Michael's testimony was self-serving and should have been excluded by the district court due to Michael's bias, his interest in assuring his competence and his financial interest in not having to give up his fee. Gonzales's claims are unpersuasive for a number of reasons.

First, this Court reviews the district court's findings to determine whether they are clearly erroneous and not for an abuse of discretion. McFarlane, ¶ 8. In addition, in its role as trier of fact, it is the district court's job to decide the credibility of witnesses and to resolve conflicts in testimony. Hendricks, ¶ 16; Santos, 273 Mont. at 131, 902 P.2d at 514. Gonzales's argument is simply a request for this Court to ignore the district court's credibility determination. This

Court should refuse to do so. Hendricks, ¶ 16. Furthermore, if anyone's testimony was self-serving, it was Gonzales's testimony. Gonzales is simply unhappy with the sentence he received. He clearly has interest in escaping from his plea bargain obligation and his current sentence.

Moreover, a review of Gonzales's statements at the change of plea hearing supports Michael's testimony and the district court's finding that Gonzales was aware of his rights when he pled guilty and that he had sufficiently discussed the plea agreement and his rights with Michael. This Court should give substantial weight to the statements Gonzales made in open court. Kaczynski, 239 F.3d at 1114-15; Chizen, 809 F.2d at 562. At the hearing, Michael told the district court about Gonzales's learning disabilities and, as a result, the district court carefully explained the various constitutional rights to Gonzales, and made sure he understood that he was waiving those rights by pleading guilty. (State's Ex. A at 2-8.) Gonzales stated that Michael had discussed his rights with him, and he had enough opportunity to ask him questions regarding those rights. Id. at 6. Gonzales also stated that what the district court had told him coincided with what Michael had previously told him. Id. at 7-8. Gonzales stated that he was satisfied with Michael's service. Id. at 8. The district court's finding that Michael had regularly communicated with Gonzales and had properly advised him is not clearly erroneous.

Gonzales has failed to demonstrate that Michael's performance was deficient under the he Strickland test. Moreover, Gonzales has not proven prejudice under the Strickland test. Gonzales has not shown that but for Michael's alleged failure to communicate with him and properly advise him, he would have insisted on going to trial for Attempted Deliberate Homicide rather than plead guilty to Arson.

B. Gonzales's Allegation That Michael Unduly Influenced Gonzales's Plea Decision by Not Refunding His Fee.

Gonzales contends that Michael unduly influenced his decision to plead guilty by refusing his request to refund his fee and get off the case in order to make way for a new attorney. Gonzales also claims Michael threatened him with an 80-year sentence. In order to demonstrate that Michael's performance regarding the refunding of his fee was deficient under Strickland, Gonzales must demonstrate that Michael's conduct fell below an objective standard of reasonableness. Whitlow, ¶ 14; Strickand, 466 U.S. at 688. When Gonzales wrote Michael asking for a refund, Gonzales had only paid Michael $2,000 of the agreed-upon $ 8,000 fee. Michael's refusal to refund the $ 2,000 was not objectively unreasonable because he earned that money through his work on the case. By then, Michael had numerous contacts with Gonzales or his family, reviewed the discovery, and negotiated a partial plea agreement with the State.

Moreover, if Gonzales had wanted a different attorney, he could have hired new counsel or made a request for the district court to appoint one if he no longer

had the means to do so. Gonzales chose to stick with Michael. Michael testified Gonzales seemed satisfied with what was going on after he met Gonzales and told him there would be no refund, what had been done on the case and where the case was heading. (5/20/09 Tr. at 174.) Gonzales's statement at the change of plea hearing that he was satisfied with Michael's services supports Michael's testimony that after their talk about the direction of the case, Gonzales was satisfied with his representation. This Court should give substantial weight to that statement. Kaczynksi, 239 F.3d at 1114-15; Chizen, 809 F.2d at 562.

Even if Gonzales could somehow demonstrate that Michael's refusal to refund the $2,000 constituted deficient representation under Strickland, Gonzales has failed to show any prejudice. Gonzales has not shown that but for Michael's refusal to refund the $2,000, he would not have pled guilty to Arson and would have gone to trial on the original and far more serious Attempted Deliberate Homicide charge.

C. Michael's Alleged Failure to Properly Advise Gonzales on the Withdrawal of His Guilty Plea

Gonzales argues that Michael failed to properly advise him concerning the withdrawal of his plea. Gonzales maintains that Michael not only failed to meet with him in a confidential setting to discuss the pros and cons of withdrawing his plea, he brought the issue up in open court at sentencing and coerced him into proceeding to an unprepared sentencing.

Michael directly refuted Gonzales's claims. Michael testified that prior to sentencing, he met with Gonzales on more than one occasion to discuss the withdrawing of his plea. (Tr. at 170, 234, 236-39.) Gonzales was unhappy with the plea agreement because he wanted only a misdemeanor. Michael told Gonzales he was not going to get a misdemeanor. Michael told Gonzales if he wanted to withdraw his plea he would file a motion to withdraw with the court, but Michael explained to Gonzales why he should not do so. (Tr. at 170-71.) Michael testified that Gonzales opted not to file the motion. (Tr. at 234-35.) As sentencing approached, Gonzales again talked about wanting to withdraw his plea. In light of their disagreements, Michael testified he thought it was best to inform the district court of the situation at sentencing. (Tr. at 170-71.)

Gonzales's statements at sentencing refute his claim that Michael did not discuss the withdrawal of his plea prior to sentencing and support Michael's testimony that he had done so. At sentencing, the district court asked Gonzales whether he had discussions with Michael about withdrawing his plea, and Gonzales responded: "Yes, there has." Gonzales also acknowledged that Michael had prepared a draft motion that could be filed with the court. (State's Ex. 2 at 6-7.)

The sentencing transcript also refutes Gonzales's claim that Michael coerced him into proceeding to sentencing. After Michael informed the district court that he was unsure if Gonzales wanted to go forward with sentencing or file a motion to

withdraw the plea on his behalf, the district court asked Gonzales what he wanted to do, and Gonzales stated that he wanted to go forward with sentencing. Id. at 5-6.

Gonzales faults Michael for failing to accept the district court's offer at sentencing to talk to Gonzales off the record. Michael did nothing improper. When the district court asked Michael if he wanted to talk to Gonzales off the record regarding how he wanted to proceed, Michael told the district court that he did not want to do so because he had already had numerous conversations with Gonzales regarding the issue, and they both clearly knew each others' positions. (Tr. at 172.)

Citing ABA standard 4-5.2, Gonzales also faults Michael for failing to resolve their dispute over the guilty plea in advance of sentencing and for his failure to maintain confidentiality. The record shows that prior to sentencing, Michael had a number of discussions with Gonzales in an attempt to determine how Gonzales wanted to proceed. Additionally, Gonzales's reliance on the ABA standard as a standard to assess the effectiveness of Michael's performance is misplaced. The ABA specifically states in part that its "standards are intended to be used as a guide to professional conduct and performance" and "[t]hey are not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction." ABA standard 4-1.1 (The Function of the Standards). The standard to assess Michael's performance is

set forth in Strickland, and that is whether Michael's conduct at sentencing "falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. ABA standards are only guides to determine what is reasonable. Strickland, 466 U.S. at 688. As the Supreme Court correctly recognized: "Under the Strickland standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." Nix v. Whiteside, 475 U.S. 157, 165 (1986).

Michael's informing the district court at sentencing that Gonzales might want to withdraw his plea and that he prepared a motion to do so was not unreasonable professional assistance. By informing the district court, Michael gave Gonzales the opportunity to make a request to withdraw his plea. Michael's disagreement over the wisdom of Gonzales's withdrawing his plea shows Michael was providing reasonable professional assistance. As Michael explained to Gonzales, if he withdrew his guilty plea, Gonzales faced the original and far more serious charge of Attempted Deliberate Homicide. Under the plea agreement, the State could only recommend a ten-year DOC sentence with five years suspended. Gonzales faced a far more serious penalty if convicted of Attempted Deliberate Homicide. Gonzales has failed to show that Michael's performance was deficient under Strickland.

Gonzales also has failed to demonstrate any prejudice under Strickland. Gonzales has not shown but for Michael's failure to advise him, he would have

chosen to withdraw his plea and gone to trial on the original charge of Attempted Deliberate Homicide. In fact, when the district court at sentencing asked him what he wanted to do, he did not ask to withdraw his plea. Instead, he told the court he wanted to proceed to sentencing.

D. Michael's Alleged Ineffective Assistance Concerning the Factual Basis of the Plea

Gonzales argues that Michael provided ineffective assistance because the facts in the Amended Information charging him with Arson did not match up with the factual basis he provided at the change of plea hearing. Pursuant to Mont. Code Ann. § 45-6-103(1)(a) (2007), the Amended Information charged Gonzales with purposely or knowingly damaging or destroying a vehicle by means of a fire that belonged to another and exceeds $1,000 in value when Gonzales set fire to K.M.'s truck. (D.C. Doc. 31.) Gonzales contends that at the plea hearing he pled guilty to Arson pursuant to Mont. Code Ann. § 45-6-103(1)(c), when he admitted to starting a fire in the truck while K.M. was inside and that the fire could have caused death or bodily injury. Gonzales claims that not only does the mistake regarding the factual basis of his plea demonstrate ineffective assistance, but he also argues that the district court's failure to find an adequate factual basis for his plea casts doubt on the voluntariness of his plea and warrants the withdrawal of his plea.

A review of Gonzales's motion to withdraw his guilty plea, his affidavit in support of his motion, and the hearing transcript reveals that Gonzales never

claimed that his plea was involuntary because he failed to provide a sufficient factual basis for his plea. (D.C. Docs. 45, 46.) In the district court proceedings, he also never alleged that Michael provided ineffective assistance with regards to the factual basis of his plea. Id. Since Gonzales is raising his claims concerning the factual basis of his plea for the first time on appeal, this Court should decline to review those claims. McFarlane, ¶¶ 12, 15; Osterloth, ¶ 20.

Even if this Court were to address the claims, Gonzales provided a sufficient factual basis for his plea of guilty to Arson when he admitted to purposely or knowingly starting the truck on fire. Montana Code Annotated § 46-12-212(1) provides that a district court may not accept a guilty plea without determining that there is a factual basis for the plea. This Court has stated that a district court "need not extract an admission from the defendant of every element of the crime in order to establish a factual basis for the guilty plea." State v. Muhammad, 2005 MT 234, ¶ 22, 328 Mont. 397, 121 P.3d 521. A district court, however, "must ascertain, from admissions made by the defendant at the plea colloquy, that his acts, in a general sense, satisfy the requirements of the offense to which he is pleading guilty." State v. Usrey, 2009 MT 227, ¶ 27, 351 Mont. 341, 212 P.3d 279.

Here, in a general sense, Gonzales's statements provided a sufficient factual basis for his guilty plea to felony Arson under Mont. Code Ann. § 45-6-103(1)(a) (2007). While there is some dispute whether the vehicle belonged to Gonzales or

his wife, Gonzales admitted to purposely or knowingly starting the truck on fire. (State's Ex. A at 9-10.) Gonzales's statement that the fire could have caused his wife death or bodily injury were not necessary for Gonzales to provide a factual basis for the Arson charge under Mont. Code Ann. § 45-6-103(1)(a). Gonzales's comments regarding the possible injuries does not change the fact that he provided a factual basis for his plea when he admitted to starting the truck on fire. Gonzales's claims that he involuntarily entered his plea and Michael provided him ineffective assistance of counsel must fail.

CONCLUSION

This Court should affirm the district court's order denying Gonzales's motion to withdraw his guilty plea.

Respectfully submitted this ____ day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 9,978 words, excluding certificate of service and certificate of compliance.

_____
MICHEAL S. WELLENSTEIN